Northern Ireland Assembly

Research and Library Service
Briefing Note

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Draft Waste and Contaminated Land (Amendment) Bill – burden of proof and means of defence – comparative legislation.

1.Context

The Draft Waste and Contaminated Land (Amendment) Bill originally contained proposals for the definition of offences under Article 4 that would have seen the burden of proof for the illegal deposit of waste shifting from the enforcing authority to the landowner. In addition the proposals would have meant that an offence was committed where an illegal deposit of waste was made whether knowingly or otherwise. The proposed amendments also contained provision for a possible defence where the accused could demonstrate that they had exercised all reasonable care to prevent the incident.

The majority of respondents to the public consultation on the Amended Bill supported these proposals but the Department of the Environment decided not to incorporate

them into the draft Bill due to concerns raised by a number of consultees around the shift in the burden of proof and the subsequent human rights implications of such a move.

As things currently stand a number of respondents have asked the Environment Committee to consider the Department's decision to ditch these proposals with a view to incorporating new proposals in the draft Bill that would both benefit those seeking to enforce the legislation whilst also providing adequate and reasonable opportunity for defence by those who may be accused of breaches.

This briefing note provides a brief overview of other pieces of legislation developed in neighbouring legislatures and how they either have or haven't dealt with this issue.

2. Summary of findings

Having reviewed legislation relating to both Environmental Protection and Waste and Contaminated Land across the UK and Ireland, and whilst recognising the provisions within the Water Order here, **there appear to be no other specific references or measures that explicitly take into account the issue of human rights in either implementation or enforcement**.

In addition, **in all of the legislation reviewed there was a clear indication that the burden of proof lay with the enforcing body when seeking to enforce legislation and secure convictions, fines or penalties for either environmental degradation or contamination of land.**

2.1 Environmental Protection Act provisions

There are a number of provisions within the Environmental Protection Act[1] that could be indirectly considered as taking account of human rights issues in relation to appeals against the imposition of remediation notices as a result of land contamination. Appendix 1 details these specific measures which include the ability for an appellant to oppose the implementation of a remediation notice on the grounds that the imposition will cause hardship to the person tasked with remedial action.

In addition the Environmental Protection Act offers some guidance to the identification of 'appropriate' persons in relation to the imposition of remediation notices. In a broad sense the principle exhibited in these measures is that of the polluter pays. There are protections for citizens through the need for the enforcing authority, upon the decision to issue a remediation notice, to detail how the person on whom the notice is to be served is the 'appropriate' person in terms of them having caused or knowingly permitted the contaminating substances to be in, on or under the land.

[1] Environmental Protection Act, 1990.

The challenge here revolves around the actual meaning of *'caused'* or *'knowingly permitted'*. The Scottish Executive which has responsibility for implementing the Environmental Protection Act in Scotland takes the view that the test of causing, ***"..will require that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable. Such involvement may also take the form of a failure to act in certain circumstances[2]."***

In relation to the definition of 'knowingly permitting', during the passage of Amendments to the Environment Bill in the House of Lords in July 1995, the Government Position put forward for the definition of this term by the then Environment Minister Earl Ferrers was as follows***. "The test of 'knowingly permitting' would require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such a substance being there."***[3]

It should be noted that both of these definitions would need to be tested in terms of their rigour by a court of law.

2.2 Nitrates Action Programme Northern Ireland

The enforcement of the Nitrates Action Programme and Action Plan in Northern Ireland requires Northern Ireland Environment Agency staff (formerly Environment and Heritage Service) to conduct inspections of farms for cross compliance. In instances of a breach of conditions NIEA can impose statutory notices requiring farmers to take remedial action.

A Guidance Booklet[4] produced for farmers in 2006 by the Department of Agriculture and Rural Development and Environment and Heritage Service sets out how the scheme would operate and what would constitute an offence or penalty. Pages 38 and 39 of the booklet set out the broad grounds for exceptional circumstances under which farmers found to be in breach of regulations can appeal against the imposition of offences. The key words here are ***"beyond the control and not foreseeable by the farmer"*** but no further definition is provided save for the inclusion of an example in the form of disease control restrictions. The onus is on the farmer to these exceptional circumstances and by so doing prove that he/she displayed '***no negligence or intent'***

There are no also currently no figures on the number of cases where farmers have appealed against conviction on the grounds of exceptional circumstances and cases are dealt with and heard by NIEA on an individual basis.

[2] Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2, Natural Scotland, Scottish Executive, May 2006, page 45.

[3] Commons Amendment to the Environment Bill, House of lords Hansard, 11th July 1995, column 1497

[4] Guidance Booklet for Northern Ireland Farmers on the requirements of the Nitrates Action Programme (Northern Ireland) Regulations 2006 and Phosphorus (Use in Agriculture) (Northern Ireland) Regulations 2006, Department of Agriculture and Rural Development and Environment and Heritage Service, 2007, pages 38-39

Appendix 1

Legislation	Jurisdiction	Burden of proof issues	Grounds for defence
Nitrates Action Programme (Northern Ireland) Regulations 2006 – Northern Ireland's response to meeting the requirements of the EU Nitrates Directive.	Northern Ireland	Inspections are conducted by Environment and Heritage (EHS) (now undertaken by NIEA) staff to establish farmers' compliance with conditions within the Nitrates Action Plan. EHS staff can issue statutory notices in light of non compliance or can initiate prosecution procedures. Offences under the Nitrates Action Plan are recognised as being • Obstructing, refusing or failing to assist Environment and Heritage Service(EHS) staff or staff carrying out duties on behalf of EHS in relation to the inspection and enforcement of the Regulations; • Failing to comply with the measures under the Nitrates Action Plan and Phosphorus Regulations; • Compiling and providing false or misleading records; • Failing to comply with a statutory notice. ***Burden of proof for lack of compliance lies with EHS (now NIEA)***	In the guidance booklet used by farmers and under exceptional circumstances ***'beyond the control and not foreseeable'*** by the farmer a defence can be made to some of the previously identified offences. All cases here are reviewed on an individual basis. The onus here is on the farmer to prove these exceptional circumstances and by so doing prove that he/she displayed '***no negligence or intent'***
Environmental Protection Act 1990, Sections 78F and 78K – Liability in respect of contaminating substances which escape to other land.	UK (sections identified here do not apply in Northern Ireland)	Linked to imposition of remediation notices in lieu of contamination of land. Remediation notices must contain detail around whether the enforcing authority considers the person on whom the notice is served to be the 'appropriate person' in terms of them having caused or knowingly permitted the contaminating substances to be in, on or under the land. Section 78F of the Environmental Protection Act sets out the means by which an appropriate person is determined to bear responsibility for remediation of contaminated land. In instances where a person or persons who caused or knowingly permitted the contamination of land cannot be found after reasonable	A person can appeal the imposition of a remediation notice in circumstances where • The enforcing authority ***unreasonably determined the appellant to be the appropriate person who is to bear responsibility for anything required by the notice to be done by way of remediation;*** • The enforcing authority ***unreasonably failed to determine that some person in addition to the appellant is an appropriate person in relation to anything required by the notice to be done by way of remediation;*** • The ***enforcing authority failed to have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable.***

		enquiry the current occupier or owner of the land becomes responsible for remediation. Section 78K of the Environmental Protection Act also sets out that a person who has caused or knowingly permitted any substances to be in, on or under any land shall also be taken for the purposes of Section 78K to have caused or, as the case may be, knowingly permitted those substances to be in, on or under any other land to which they have appeared to escape. Significance is that this section recognises the damage that can be caused to another person's land by a polluter ***Burden of proof lies with the enforcing authority***	In instances where an individual's(person A) land is contaminated by someone else's actions, person A 'who has not caused or knowingly permitted the substances in question to be in, on or under that land,… In these instances (Person A) Shall not be required ***to do anything by way of remediation to any land or waters (other than land or waters of which he is the owner of occupier) in consequence of land A appearing to be in such a condition…***